

1  
2  
3  
4  
5  
6  
7 **BEFORE THE PUBLIC DISCLOSURE COMMISSION**  
8 **OF THE STATE OF WASHINGTON**

9 In the Matter of Enforcement  
10 Action Against

NO. 03-147

11 Marilou Rickert,

PREHEARING MEMORANDUM

Respondent.

12 COMES NOW the Public Disclosure Commission Staff, by and through  
13 its attorneys of record, CHRISTINE O. GREGOIRE, Attorney General and  
14 LINDA A. DALTON, Senior Assistant Attorney General, and submits this  
15 prehearing memorandum.

16 **1. PROCEDURAL HISTORY**

17 On November 19, 2002, the Public Disclosure Commission staff  
18 received a complaint against the Respondent, Marilou Rickert (Rickert)  
19 alleging that she violated RCW 42.17.530(1) by making a false statement of  
20 material fact against her opponent in the 2002 election, Tim Sheldon  
21 (Sheldon).

22 Following an investigation, staff charged Ms. Rickert with violating  
23 RCW 42.17.530(1) because of one statement she made in her political  
24 advertisement that was mailed shortly before the November 5, 2002 general  
25 election. The sole statement at issue in this case is “. . . (Sheldon) voted to  
26 close a facility for the developmentally challenged in his district. . .”

1 This matter was originally set for May 27, 2003. Following the receipt  
2 of a Response from Ms. Rickert to the Notice of Administrative Charges, a  
3 prehearing conference was held on May 27, 2003. The hearing in this matter  
4 is currently scheduled for July 29, 2003.

5 **2. FACTS**

6 The facts in this case are relatively undisputed. Pursuant to the  
7 scheduling order, the parties will submit stipulations as to the facts on July  
8 22, 2003.

9 The parties agree that Ms. Rickert, was a candidate for the office of  
10 State Senator for the 35<sup>th</sup> Legislative District in 2002. Her opponent,  
11 Senator Tim Sheldon, was re-elected on November 5, 2002.

12 During the course of Ms. Rickert's campaign, she sponsored a mailing  
13 to certain constituents in the 35<sup>th</sup> District. A portion of the mailing is the  
14 subject of this enforcement proceeding. The mailing itself was a brochure,  
15 around which was wrapped a one letter size page that outlined the  
16 differences between Ms. Rickert and Senator Sheldon. It reads, in relevant  
17 part, that while a state Senator, Senator Sheldon "voted to close a facility for  
18 the developmentally challenged in his district . . ."

19 Staff determined that this was a false statement for two reasons. First,  
20 the vote addressed in the mailing was a vote on the 2002 state budget bill,  
21 namely, Senate Bill 6387 and Engrossed Senate Bill 6387. The budget bill  
22 eliminated funding for a juvenile rehabilitation facility that was within the  
23 35<sup>th</sup> District. As to both bills, Senator Sheldon voted against the passage of  
24 this bill.

1 Second, the facility referenced by Ms. Rickert in her mailing is not a  
2 facility for "developmentally challenged" persons. It is in fact a facility that  
3 housed juvenile felony offenders, Mission Creek Youth Camp.

4 Ms. Rickert relied upon a single source for this statement in her  
5 mailing, i.e., Dave Wood. She took information he provided her following  
6 several conversations with her from the end of June of 2002 through October  
7 2002 and made this statement.

### 8 **3. ISSUES PRESENTED**

9 The issues before the Commission are to determine if this statement in  
10 Ms. Rickert's political advertising violates RCW 42.17.530 and if so, what  
11 penalty to assess as a result.

### 12 **4. LEGAL ARGUMENT**

13 RCW 42.17.530(1) required staff to prove, by clear and convincing  
14 evidence, that Ms. Rickert sponsored "with actual malice" political  
15 advertising that contained a false statement of material fact about Senator  
16 Sheldon. Actual malice is defined as acting with knowledge of falsity or with  
17 reckless disregard as to the truth or falsity of the statement. RCW  
18 42.17.505.<sup>1</sup>

19 The current version of RCW 42.17.530(1)(a) was enacted as a  
20 legislative response to the Washington Supreme Court decision in *State v.*  
21 *119 Vote No! Committee*, 135 Wn.2d 618 (1998). In the *119 Vote No!*  
22 *Committee* case, a plurality of the Court determined that the language of the  
23

---

24 <sup>1</sup> In Ms. Rickert's response to the Notice of Administrative Charges, she argues that  
25 RCW 42.17.530(1) is unconstitutional both on its face and as applied to her. At the May 27,  
26 2003 prehearing conference, the Commission Chair advised the parties that the Commission  
had no authority to consider any of these arguments and they would not be addressed in the  
proceeding. See Prehearing Order mailed June 2, 2003. Therefore, Staff will not provide  
argument on this issue.

1 statutory predecessor to the current law was unconstitutional under the  
2 First Amendment to the U.S. Constitution.<sup>2</sup>

3 Following this decision, the Washington Legislature reviewed the Court  
4 opinion and found that a statute that prohibited sponsoring, with actual  
5 malice, false statements of material fact about a candidate other than  
6 themselves to be an appropriate exercise of government powers. Out of this  
7 decision came the language for the present day version of RCW 42.17.530(1).  
8 Ms. Rickert is now charged under the new statute.

9 *A. Burden of Proof*

10 The parties are in agreement that the burden of proof for the Staff is  
11 "clear and convincing evidence." RCW 42.17.530(1). The parties also agree  
12 that this burden is higher than a mere "preponderance of the evidence."  
13 This is where the parties' agreement ends. The evidence presented at the  
14 hearing as to each element of the statute will prove by clear and convincing  
15 evidence that Ms. Rickert violated the statute.

16 *B. Elements of Charge*

17 In order to prevail, Staff must demonstrate first that Ms. Rickert made  
18 a false statement of material fact. Staff must prove that the statement Ms.  
19 Rickert made, that Senator Sheldon's vote was 1) a vote to 2) close 3) a  
20 facility for 4) the developmentally challenged 5) in his district, was false. And  
21 then Staff must prove that this statement was a material fact to this  
22 campaign.

23 *i. Falsity*

24 <sup>2</sup> The Court's decision is widely divided with only three Justices joining in the determination  
25 that the former RCW 42.17.530 as applied both to ballot initiatives and candidates is unconstitutional.  
26 The two other Justices that form the basis for the majority in this case agreed that the statute was  
unconstitutional as applied to ballot initiatives but reserved that it may not be so if applied to  
candidates as is the case before the Commission.

1 The statement made by Ms. Rickert about Senator Sheldon's voting  
2 record is false on several bases. First, the vote cast by Senator Sheldon that  
3 pertains directly to this matter was his vote on the 2002 budget bills, i.e., SB  
4 6387 and ESB 6387. These bills contained the provisions that eliminated all  
5 funding for the facility at issue in this case. Had the bills not passed,  
6 funding for the facility would have remained in place and the facility open.  
7 Senator Sheldon voted against these bills. Therefore, his vote was one to  
8 retain funding for the facility.

9 Next, the facility identified by Ms. Rickert as one for the  
10 developmentally challenged is actually one to house criminally convicted  
11 juveniles in Washington State. The parties agree that the facility is the  
12 Mission Creek Youth Camp, operated by the Department of Social and  
13 Health Services, Juvenile Rehabilitation Administration. Ms. Rickert was  
14 unfamiliar with this facility before and during her run from the State Senate.  
15 She only learned what the true mission of the youth camp was after this  
16 complaint was filed against her. She did nothing to learn more about the  
17 facility prior to sponsoring her political advertisement than misinterpret  
18 what information she obtained from one person about it.

19 The testimony at hearing will also show that Ms. Rickert got her  
20 information about Mission Creek from a lobbyist named David Wood. Mr.  
21 Wood is an advocate for the developmentally disabled in Washington. Ms.  
22 Rickert relied solely on a few conversations with Mr. Wood and did no  
23 verification of the accuracy of what he said or her interpretation of what he  
24 said before she made her declarative statement.

1 Based on this evidence, Staff will have shown that the statement Ms.  
2 Rickert made was false. It is then incumbent on Staff to prove that Ms.  
3 Rickert acted with actual malice as defined in the statute.

4 ii. Materiality

5 Whether a statement is material to any particular campaign is a  
6 question of fact for the Commission to determine. What may be material in  
7 one campaign could mean nothing in the next.

8 Ms. Rickert will testify that during her campaign the issues she  
9 wanted to emphasize was altered by the issues that the public considered  
10 important. While she remained true to her core values, she also recognized  
11 that certain other issues were important to her constituency. That is why  
12 when she published her political advertisement within the last few weeks  
13 before the election day, she included in the mailing an outline of those  
14 critical differences between herself and Senator Sheldon.

15 Senator Sheldon will also testify about the issues critical to his  
16 district. He will agree with Ms. Rickert that amongst those was the issue of  
17 state jobs being eliminated and funding for social services being cut. To  
18 paint his vote as one that eliminated funding for social services, especially  
19 services for the disabled, was particularly important in this race.

20 Finally, Mr. Wood will testify about the importance of supporting social  
21 service funding and that he worked tirelessly to promote spending on these  
22 issues.

23 In this campaign, the evidence will show that funding for social  
24 services was indeed material and Ms. Rickert's attempt to cast Senator  
25 Sheldon as cutting those services is critical to how a voter might be impacted  
26 in their vote.

1 C. *Actual Malice*

2 Actual malice, as used in RCW 42.17.530, is defined in RCW  
3 42.17.505. Actual malice is defined as acting with knowledge of falsity or the  
4 reckless disregard of the truth or falsity of the statement made. The  
5 Commission need not resort to any other definition in that the statute  
6 provides it. This definition has not been challenged in the past and the  
7 Commission itself has applied it in several cases in the past, therefore, it is  
8 unnecessary to look to other contexts for interpretation. It is incumbent on  
9 the Commission to determine whether the facts in this case lead it to believe  
10 that Ms. Rickert recklessly disregarded the facts she asserted.

11 The Commission has considered cases in the past under the  
12 predecessor to RCW 42.17.530 and applied the actual malice standard to  
13 them. These cases are directly relevant to this discussion.

14 First, in *In re Citizens for a Better Redmond/Conklin*, PDC Case No. 92-  
15 194, the Commission determined that the political committee acted with  
16 actual malice because "they acted in reckless disregard of whether the  
17 statements were true when even a brief review of readily available  
18 information would have demonstrated that they were false." PDC Case No.  
19 92-194 at 8. In evaluating this claim, the Commission considered the  
20 statements made and the limited amount of review of "readily available"  
21 information that could have cleared up any falsity. In that case, the  
22 Commission ordered a \$2,000 penalty for the multiple violations of RCW  
23 42.17.530.

24 In *In re Eric Robertson*, PDC Case No. 95-077, the Commission  
25 determined that the Respondent violated RCW 42.17.530 again with actual  
26

1 malice because he had been told by his opponent on several occasions about  
2 her voting record and yet still published the false statements about her.<sup>3</sup>

3 At the hearing, Ms. Rickert will testify that all she relied upon for  
4 making the statement in this case was a few conversations she had with Mr.  
5 Wood and some feelings she had obtained while meeting with various groups  
6 about issues in the 35<sup>th</sup> District. She did not have any knowledge of Mission  
7 Creek prior to this race and really only understood its mission once the  
8 complaint was filed.

9 A variety of witnesses will demonstrate the simple steps she could have  
10 taken to verify the truth or falsity of the statement she was making. She will  
11 acknowledge that she had campaign staff available to do research for her but  
12 that she was terribly busy during the requisite time period and did not stop  
13 to take what little time it would have taken to verify her words.

14 / / /

15 / / /

16 / / /

17  
18  
19  
20  
21  
22 <sup>3</sup> The Commission has considered two other false advertising cases but under other provisions of RCW  
23 42.17.530. In *In re Affordable Housing Council*, PDC Case No. 96-101, the Commission determined  
24 that the Council had issued a deceptive ad that falsely let the reader believe that one candidate had  
25 the endorsement of the King County Council, when in fact such was not the case. The Commission  
26 ordered a \$500 penalty for violating RCW 42.17.530. In the only decision under RCW 42.17.530 since  
the law was rewritten, *In re Cheryl Chow for Mayor Campaign*, PDC Case No. 98-190, the Respondent  
stipulated to violating RCW 42.17.530 by publishing a campaign brochure that inferred that two  
individuals she was photographed with endorsed her campaign. She also stipulated to \$1,000 penalty  
for this behavior.



1 **5. CONCLUSION**

2 At the conclusion of the case, Staff will argue that each element of a  
3 case for violation of RCW 42.17.530 has been met. Given this, Staff will  
4 request a penalty that reflects the seriousness of Ms. Rickert's action and  
5 inaction in this matter.

6 DATED this 7<sup>th</sup> day of July, 2003.

7 CHRISTINE O. GREGOIRE  
8 Attorney General

9  
10 for: *Jerry A. Ackerman* (#6535)  
11 LINDA A. DALTON, WSBA #15467  
12 Senior Assistant Attorney General  
13 Attorney for Commission Staff  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

1  
2  
3  
4  
5  
6  
7 **BEFORE THE PUBLIC DISCLOSURE COMMISSION**  
8 **OF THE STATE OF WASHINGTON**

9 In the Matter of Enforcement  
10 Action Against

NO. 03-147

11 Marilou Rickert,

DECLARATION OF MAILING

Respondent.

12 I, Kimberly A. Peake, make the following declaration:


13 I am over the age of 18, a resident of Thurston County, and not a party  
14 to the above action. On July 7, 2003, I caused to be served a true and correct  
15 copy of the Commission Staff Hearing Brief follows:

16 Venkat Balasubramani  
17 Newman & Newman  
18 Attorneys at Law  
1001 Fourth Avenue Plaza, Ste 2560  
Seattle, WA 98154  
[X] via Legal Messenger

19 Nancy Krier  
20 Assistant Attorney General  
1125 Washington Street SE  
21 PO Box 40110  
Olympia, WA 98504  
22 [X] via hand delivery

23 I declare under penalty of perjury under the laws of the State of  
24 Washington that the foregoing is true and correct.  
25  
26

1 Dated this 7th day of July 2003 at Olympia, Washington.  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

  
KIMBERLY A. PEAKE  
Legal Assistant

